STATE OF MICHIGAN

COURT OF APPEALS

In the Matter of the Estate of JAMES P. BARKMAN, Deceased.

DAWN HORN,

Petitioner-Appellee,

v

SUE B. SHAUGHNESSY, as Personal Representative of the Estate of JAMES P. BARKMAN, and THOMAS ZORN,

Respondents-Appellants.

UNPUBLISHED
March 10, 2000

No. 212811
Genesee Probate Court
LC No. 97-153635-IE

Before: Holbrook, Jr., P.J., and Kelly and Collins, JJ.

PER CURIAM.

Respondents appeal as of right from the probate court's order denying reconsideration of a prior order partially granting petitioner's motion to compel delivery of property under decedent James P. Barkman's will or, in the alternative, under decedent's trust. We affirm.

During decedent's lifetime, he owned several businesses, including Jim's Mini and RV Storage in Genesee County. On September 4, 1992, decedent executed both a pour-over will and a trust, designating himself trustee. In subsequent years, decedent executed two codicils to the will and two amendments to the trust. The second codicil, executed on December 18, 1995, devises to petitioner the option to purchase the premises known as Jim's Mini and RV Storage ("the Mini-storage property"). On October 29, 1996, decedent executed a deed that included five parcels of real property he owned in Genesee County ("the Genesee deed"). The Genesee deed purported to quitclaim several properties, including the Mini-storage property, to decedent's trust. On February 22, 1997, decedent died. Respondent Shaughnessy was appointed personal representative of decedent's estate and, along with respondent Zorn, succeeded decedent as co-trustee of decedent's trust.

Thereafter, petitioner filed a petition, claiming that she was a devisee of decedent's estate pursuant to the language of the second codicil or, in the alternative, that the second codicil amended decedent's trust so as to grant petitioner the option to purchase the Mini-storage property. Petitioner also filed a motion to compel delivery of the Mini-storage property pursuant to the second codicil, arguing that decedent's written intent to allow petitioner the option to buy the premises should be honored. The probate court originally ruled that respondents satisfied their burden of showing decedent delivered the Genesee deed to himself as trustee of his trust. It also ruled, however, that the second codicil to decedent's will constituted an amendment to his trust and, thus, that petitioner was allowed the option of purchasing the Mini-storage property pursuant to the terms set forth in the second codicil. As an alternative means of relief, the probate court ruled that equity demanded imposition of a constructive trust to allow petitioner the option of purchasing the property. Both parties filed motions for reconsideration of that order. At that time, petitioner introduced new evidence suggesting certain property that was also included in the Genesee deed was conveyed soon after decedent's execution of the Genesee deed in decedent's individual capacity, not in his capacity as trustee of his trust. Based on that new evidence, the probate court granted petitioner's motion for reconsideration, finding that respondents did not satisfy their burden of proving decedent delivered the Mini-storage property to his trust. The probate court denied respondents' motion for reconsideration of the rulings providing petitioner alternative means of relief.

On appeal, respondents first argue that the probate court erred in finding that the Mini-storage property was not conveyed to decedent's trust and in ruling petitioner was entitled to the option of purchasing the property pursuant to the terms of the second codicil to decedent's will. We disagree. We review a probate court's findings of fact for clear error. *In re Coe Estate*, 233 Mich App 525, 531; 593 NW2d 190 (1999). Clear error should only be found when the reviewing court is left with a definite and firm conviction that a mistake was made. *In re Erickson Estate*, 202 Mich App 329, 331; 508 NW2d 181 (1993).

In order for decedent to have conveyed the Mini-storage property to his trust, he must have intended to presently and unconditionally convey the interest and must have delivered the property to his trust. See *Havens v Schoen*, 108 Mich App 758, 761; 310 NW2d 870 (1981); see also *Energetics, Ltd v Whitmill*, 442 Mich 38, 53; 497 NW2d 497 (1993). The party relying on a deed has the burden of proving delivery by a preponderance of the evidence. *Camp v Guaranty Trust Co*, 262 Mich 223, 226; 247 NW 162 (1933); *Havens, supra* at 761; see *Energetics, supra* at 53. Valid delivery may be achieved despite the fact that a deed is not recorded. *Schmidt v Jennings*, 359 Mich 376, 383; 102 NW2d 589 (1960); *Camp, supra* at 225; see *Energetics, supra* at 53. Here, decedent's attorney, Edward J. Neithercut, provided significant testimony regarding decedent's later conveyance of property that was included in the Genesee deed in decedent's individual capacity. The probate court properly considered such testimony as it was relevant to determining whether the property included in the Genesee deed was delivered to decedent's trust.[1] Petitioner introduced copies of deeds conveying Lots 31 and 34 of Barkman Acres[2] in December 1996, indicating the lots were conveyed by decedent in his individual capacity. Such evidence indicates decedent did not intend to presently and unconditionally convey his interest in those lots to his trust when he executed the Genesee deed and therefore the Mini-storage property also was not transferred to the trust as originally

suggested by decedent's execution of the quitclaim deed. Respondents did not introduce evidence disputing Barkman's subsequent action with respect to Lots 31 and 34 and the inference of non-delivery that such action raises. Consequently, the probate court did not clearly err in finding that respondents failed to satisfy their burden of showing that the Mini-storage property was delivered to the trust and it acted within its discretion in ruling that the Mini-storage property remained in Barkman's estate to be distributed pursuant to the terms of the second codicil.

Given our disposition of this issue, it is unnecessary for us to consider the merit of respondents' remaining issues that challenge the probate court's alternative rulings.

Affirmed.

/s/ Donald E. Holbrook, Jr.
/s/ Michael J. Kelly
/s/ Jeffrey G. Collins

[1] The matter at issue is distinguishable from circumstances involving the determination of a testator's intent to make a specific devise under a testamentary instrument. Cf. *In re McPeak Estate*, 210 Mich App 410, 412; 534 NW2d 140 (1995) (stating that a probate court is to give effect to a testator's intent as derived from the testamentary instrument unless an ambiguity in the instrument necessitates consideration of extrinsic facts).

[2] Although Lots 31 and 34 were not included in the copy of the Genesee deed that was recorded or the copies offered at several times prior below, Neithercut testified that a description of those lots was originally included in the Genesee deed executed by decedent, but was removed from the copy that was recorded and the copy given to respondent Shaughnessy in preparation of this litigation. According to Neithercut, he altered the deed because he knew decedent had sold Lot 34 in December 1996. Neithercut stated that decedent never saw the altered version of the Genesee deed.